ORIGINAL

No. 97-1914

MOTION FILED

JUL 23 1998

In the Supreme Court of the United States

OCTOBER TERM, 1997

CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; AND JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER; ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; AND KRIS A. MCLEAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF ABC, INC.; A.H. BELO CORPORATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION; CBS BROADCASTING INC.; THE COPLEY PRESS, INC.; FOX TELEVISION STATIONS, INC.; GANNETT CO., INC.; THE HEARST CORPORATION; KING WORLD PRODUCTIONS, INC.; THE LOS ANGELES TIMES; MAGAZINE PUBLISHERS OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING COMPANY, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEWSPAPER ASSOCIATION OF AMERICA, INC.; THE ORANGE COUNTY REGISTER; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; TRIBUNE COMPANY; AND UNIVISION TELEVISION GROUP, INC. IN SUPPORT OF PETITIONERS

LEE LEVINE
Counsel of Record
JAY WARD BROWN
LEVINE PIERSON SULLIVAN & KOCH, L.L.P.
1050 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
Counsel for Amici

(Additional counsel listed inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

Of Counsel:

JEAN E. ZOELLER
JEFFREY D. FROST
ABC, INC.
2020 Avenue of the Stars
Suite 560
Los Angeles, California 90067
(310) 557-7101
Counsel for ABC, Inc.

MICHAEL MCCARTHY
MARIAN SPITZBERG
A.H. BELO CORPORATION
400 South Record Street
Dallas, Texas 75202
(214) 977-8730
Counsel for A.H. Belo Corporation

RICHARD M. SCHMIDT, JR.
KEVIN M. GOLDBERG
COHN AND MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860
Counsel for the American Society of Newspaper Editors

THOMAS NEWTON
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
1225 8th Street, Suite 260
Sacramento, California 95814
(916) 443-5991
Counsel for California Newspaper Publishers Association

SUSANNA M. LOWY
FREDERICK F. MUMM
CBS BROADCASTING INC.
51 West 52nd Street
New York, New York 10016
(212) 975-8758
Counsel for CBS Broadcasting Inc.

HAROLD W. FUSON, JR.
JUDITH L. FANSHAW
THE COPLEY PRESS, INC.
7776 Ivanhoe Avenue
Post Office Box 1530
La Jolla, California 92037-1530
(619) 454-0411
Counsel for The Copley Press, Inc.

CAROLYN Y. FORREST
FOX TELEVISION STATIONS, INC.
1551 Briarcliff Road N.E.
Atlanta, Georgia 30306
(404) 724-4421
Counsel for Fox Television Stations, Inc.

BARBARA WARTELLE WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
(703) 284-6951
Counsel for Gannett Co., Inc.

ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Avenue
New York, New York 10019
(212) 649-2050
Counsel for The Hearst Corporation

RALPH E. GOLDBERG
KING WORLD PRODUCTIONS, INC.
1700 Broadway
New York, New York 10019
(212) 315-4000
Counsel for King World Productions, Inc.

KARLENE W. GOLLER
THE LOS ANGELES TIMES
Times Mirror Square
Los Angeles, California 90053
(213) 237-3760
Counsel for The Los Angeles Times

JERRY S. BIRENZ
SLADE R. METCALF
c/o MAGAZINE PUBLISHERS OF AMERICA, INC.
919 Third Avenue
New York, New York 10022
(212) 692-4457
Counsel for Magazine Publishers of America, Inc.

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036-2891
(202) 429-5430
Counsel for National Association of Broadcasters

ANNE H. EGERTON
PATRICIA DUNCAN
NATIONAL BROADCASTING COMPANY, INC.
3000 West Alameda Avenue
Burbank, California 91523
(818) 840-4444
Counsel for National Broadcasting Company, Inc.

DANIEL L. BRENNER
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3550
Counsel for National Cable Television Association, Inc.

RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF AMERICA, INC.
1921 Gallows Road, Suite 600
Vienna, Virginia 22182-3900
(703) 902-1815
Counsel for Newspaper Association of America, Inc.

JANE E. KIRTLEY
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Suite 1910
1101 Wilson Boulevard
Arlington, Virginia 22209
(703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CHARLES J. SENNET
DALE M. COHEN
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-3232
Counsel for Tribune Company

SYLVIA R. ESQUIVEL
RACHELLE MARIE BIN
UNIVISION COMMUNICATION, INC.
6701 Center Drive West
Los Angeles, California 90045
(310) 338-0700
Counsel for Univision Television Group, Inc.

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1914

CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; AND JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER; ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; AND KRIS A. MCLEAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

ABC, Inc., A.H. Belo Corporation, American Society of Newspaper Editors, California Newspaper Publishers Association, CBS Broadcasting Inc., The Copley Press, Inc., Fox Television Stations, Inc., Gannett Co., Inc., The Hearst Corporation, King World Productions, Inc., The Los Angeles Times, Magazine Publishers of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Cable Television Association, Inc., Newspaper Association of America, Inc., The Orange County Register, The Reporters Committee for Freedom of the Press, Tribune Company and Univision Television Group, Inc. respectfully move this Court for

leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari in this case. All of the petitioners and all of the respondents other than Paul and Erma Berger have consented to the filing of the brief *amici curiae*. Respondents Paul and Erma Berger do not consent to the filing of the brief *amici curiae*.

The prospective *amici* and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public. The prospective *amici* regularly report to the public about, among other matters, the activities of federal, state and local governments and their officials, including the performance by law enforcement agencies of their public duties. *See* Appendix A *infra*.

The decision of the United States Court of Appeals for the Ninth Circuit in this case purports to establish two extraordinary principles of law: (1) the mere fact that a news organization seeks and receives approval from a government agency to observe its officers performing their public functions renders the news organization a "government actor" for purposes of civil liability pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); and (2) permission granted by a government agency for reporters to observe law enforcement officers when they execute search warrants is a violation of the Fourth Amendment unless the presence of the news media is authorized in advance by a magistrate. The first of these novel constitutional principles is contrary to this Court's precedents defining what constitutes governmental action and greatly expands the universe of private conduct subject to constitutional scrutiny. The second principle stands in marked conflict with the holdings of other courts of appeals, leaving both law enforcement officers and the news media without a nationally applicable constitutional standard to which they may conform their conduct.

Unless the decision below is reversed, it is likely to curtail sharply the ability of the prospective *amici* to serve effectively as surrogates of the American people in observing and reporting to their fellow citizens about the activities of law enforcement officers and other government officials. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (news media properly "function[] as surrogates for the public"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (public "relies necessarily upon the press" to report on operations of government and "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (the press "stands as one of the great interpreters between the government and the people"). Thus, the prospective *amici* possess an abiding interest in ensuring that the Court has an opportunity to review the full implications of the decision below.

The accompanying brief *amici curiae* addresses at least three significant matters relevant to this Court's consideration of the Petition for Writ of Ceritorari not previously brought to its attention:

(a) the significant public purposes served by the kind of newsgathering and reporting at issue in this case;

(b) specific examples of the benefit that has accrued to the public through the journalistic methods effectively condemned by the Court of Appeals; and

(c) the deleterious effect the currently conflicting rulings of the courts of appeals will have on the ability of news organizations to observe and report upon government activity at all levels.

Accordingly, because these matters affect not only the interests of the prospective *amici*, but also the interests of the American public in the free flow of information concerning the conduct of its government, the prospective

amici respectfully request that this Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

LEE LEVINE
Counsel of Record
JAY WARD BROWN
LEVINE PIERSON SULLIVAN
& KOCH, L.L.P.
1050 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
Counsel for Amici

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
REASONS FOR GRANTING THE WRIT	2
I. THE DECISION BELOW EXPANDS THE DOCTRINE OF GOVERNMENTAL ACTION AND SEVERELY RESTRICTS THE MEDIA'S ABILITY TO FULFILL THE CRITICAL ROLE PERFORMED BY NEWS COVERAGE OF LAW ENFORCEMENT ACTIVITIES	2
A. Deeming A News Organization A Governmental Actor Because It Obtains Permission To Observe Public Officials Performing Their Duties Conflicts With Decisions Of This Court And Other Courts Of Appeals	3
B. The Ninth Circuit's Holding, That Inviting The News Media To Observe The Execution Of A Search Warrant Is Unreasonable Under The Fourth Amendment, Will Foreclose First-Hand News Reports of Law Enforcement Activities And Will Deprive The Public Of Valuable Information About The Functioning Of Its Government	12
II. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUITS THAT LEAVES NATIONAL NEWS ORGANIZATIONS AND LAW ENFORCEMENT AGENCIES WITHOUT A UNIFORM CONSTITUTIONAL STANDARD TO WHICH THEY CAN CONFORM THEIR CONDUCT	17
CONCLUSION	20
APPENDIX A:	
Identity of Individual *Amici*	1a

TABLE OF AUTHORITIES

CASES

	Page
Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998)	13
Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984)	18
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994)	18
Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997)	*passim*
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995)	18
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	1
Blum v. Yaretsky, 457 U.S. 991 (1982)	11
Brooks v. American Broadcasting Cos., 737 F. Supp. 431 (N.D. Ohio 1990), *aff'd in part and vacated in part on other grounds*, 932 F.2d 495 (6th Cir. 1991)	7
Buford v. Tremayne, 747 F.2d 445 (8th Cir. 1984)	5, 6
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995)	4
Butz v. Economou, 438 U.S. 478 (1978)	4
Chicago Joint Board v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970)	7
Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980)	6, 7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	15, 16
FCC v. League of Women Voters, 468 U.S. 364 (1984)	13
Fitzpatrick v. Wert, 432 F. Supp. 601 (W.D.N.Y. 1977)	8
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	12, 20
Grosjean v. American Press Co., 297 U.S. 233 (1936)	1, 17
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	11
Higbee v. Times-Advocate, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980)	18
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)	11
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	11

TABLE OF AUTHORITIES—Continued

	Page
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	4, 5
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	12
Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862 (E.D. Pa. 1972)	7, 8, 9
Moncrief v. Hanton, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio 1984)	18
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	14
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	11
In re Oliver, 333 U.S. 257 (1948)	16
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997)	4, 5, 17, 18
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)	12
Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980)	18
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)	16
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	11
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	14, 15, 16, 17
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987)	8, 11
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996)	18
Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998)	18, 19
Zerilli v. Evening News Association, 628 F.2d 217 (D.C. Cir. 1980)	8

STATUTE

42 U.S.C. § 1983	4

OTHER AUTHORITIES

William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 MODERN POLICING 231 (Michael Tonry & Norval Morris eds. 1992)	16

TABLE OF AUTHORITIES—Continued

Page

David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. Univ. L. Rev. 449 (1997) 16

Manual of the Los Angeles Police Department (1992) 9

Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909 (1996) 16

Safety Checkpoints for DWI Enforcement, U.S. Dep't of Transportation National Highway Traffic Safety Administration Office of Alcohol Countermeasures (1983) 16

Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679 (1997) 16

BRIEF OF *AMICI CURIAE* ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public by, among other means, observing public officials—including law enforcement officers interacting directly with the public—as they perform their governmental functions. *See* Appendix A *infra*. The decision below effectively condemns this form of news reporting and, unless reversed by this Court, threatens to frustrate the ability of *amici* to fulfill their historic role as "the great interpreters between the government and the people." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).[1]

SUMMARY OF ARGUMENT

The decision below purports to establish two novel rules of constitutional law. According to the Ninth Circuit, an agreement between the government and a news organization to permit a reporter to be present during execution of a search warrant renders the news organization a "joint actor" with the government and thereby subjects it to constitutional liability under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Furthermore, according to the Ninth Circuit, the news media's presence during execution of a search warrant violates the Fourth Amendment—at least if not approved in advance by the magistrate issuing the warrant.

To hold, as the Ninth Cicuit has, that the press becomes a joint actor with the government simply because it obtains access by agreement to a particular government undertaking vastly enlarges the scope of this Court's "gov-

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

ernmental action" doctrine, which heretofore has been narrowly crafted. Moreover, in practical terms, the Ninth Circuit's twin holdings will effectively curtail a valuable form of reporting that has long served the constitutionally protected function of bringing public scrutiny to bear on official conduct. Such reporting both increases confidence in the criminal justice system and furthers other salutary public purposes. The Ninth Circuit's contrary conclusion—that such news coverage is nothing more than "entertainment" produced for "commercial" purposes—is squarely at odds with this Court's constitutional jurisprudence. Furthermore, the decision below conflicts with a decision of the Eighth Circuit and caps a series of confusing and often contradictory rulings from other circuits, leaving news organizations and law enforcement entities without a nationally applicable standard to which they can conform their conduct.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPANDS THE DOCTRINE OF GOVERNMENTAL ACTION AND SEVERELY RESTRICTS THE MEDIA'S ABILITY TO FULFILL THE CRITICAL ROLE PERFORMED BY NEWS COVERAGE OF LAW ENFORCEMENT ACTIVITIES

The Ninth Circuit's decision effectively converts a private news organization such as CNN into a governmental actor whenever it seeks and obtains permission to observe public officials performing their duties. The holding conflicts with this Court's jurisprudence concerning the scope of the "governmental action" doctrine and threatens the ability of the American press to report to the public about a vast spectrum of government activity. Other courts, including the Eighth Circuit, have expressly held that a private news organization, acting to fulfill the public's interest in newsgathering, does not become a joint actor with government simply by virtue of being permitted by public officials to obtain access to the scene of governmental activity. The Ninth Circuit's decision to the contrary not only will deprive the public of a valuable source

of vital information about the government's enforcement of the law (and a means by which the public's confidence in the justice system may be maintained), it also frustrates, from the point of view of law enforcement, the pursuit of other valuable and wholly legitimate public purposes.[2]

A. Deeming A News Organization A Governmental Actor Because It Obtains Permission To Observe Public Officials Performing Their Duties Conflicts With Decisions Of This Court And Other Courts Of Appeals

The Ninth Circuit held that CNN may be liable in damages under the Fourth Amendment because its reporters and agents of the U.S. Fish & Wildlife Service "acted together" in "conduct[ing] a search" of Paul and Erma Berger's ranch pursuant to a warrant. *Berger v. Hanlon*, 129 F.3d 505, 515-16 (9th Cir. 1997). The court below rested this conclusion on a one-page letter specifying the terms under which CNN would be permitted to observe execution of the warrant. Set forth in full by the court below, *id.* at 508, the letter contains only two material terms: (1) CNN reserved absolute editorial control over the fruits of its newsgathering and (2) CNN indicated it would withhold telecast of the footage so obtained until such time as disseminating it would not interfere with Mr. Berger's right to a fair trial. The Ninth Circuit deemed this "agreement" to constitute a blueprint for CNN's " 'inextricable' involvement" with "both the planning and execution of this search." *Id.* at 515.[3] Its fur-

---

[2] Like the petitioners, *amici* are concerned here only with the imposition on the news media of liability for constitutional violations on a theory of "joint action" with the government. The Bergers brought a number of other, non-constitutional claims against CNN and its reporters, including for trespass, none of which are implicated by the Petition or the arguments made herein, and upon the merits of which the *amici* express no view.

[3] The Ninth Circuit also noted that, as alleged by the Bergers, CNN reporters "participated in a pre-search briefing the day before the search, at which the federal [law enforcement officers] shared with the media details" of the warrant and the planned search. *Berger v. Hanlon*, 129 F.3d at 509. If such routine, passive news-

ther conclusion that such an "agreement" constitutes "governmental action" for purposes of *constitutional* liability cannot be squared with this Court's precedents.

As the Court has cautioned, private parties are not liable for the deprivation of constitutional rights unless their conduct is "fairly attributable" to the government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Indeed, in a recent decision—one that expressly honors this Court's reluctance to expand the scope of private conduct constituting governmental action and that, consequently, reaches a result that is contravened by the decision below—the Eighth Circuit dismissed section 1983 claims against a television station arising from nearly identical circumstances. *See Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).[4]

---

gathering constitutes joint "planning" with public officials, as the Ninth Circuit asserted, *see id.* at 510, 512, there is virtually no circumstance in contemporary coverage of formal government actions in which the news media would *not* qualify as governmental actors. *See, e.g.*, Jim Newton, *L.A.'s Disaster Officials Gather to Build on the Past*, L.A. Times, Dec. 13, 1997, at B1 (reporter invited to attend conference of disaster response officials reporting on plans to improve emergency response); Edith M. Lederer, *1,000 Raids on Iraq; Second Wave Hits Iraqis*, Phila. Daily News, Jan. 17, 1991, at 3 (reporters permitted to attend Department of Defense briefings on military operations in Persian Gulf). *Amici* respectfully submit that the Ninth Circuit ignored the critical difference between observing and questioning governmental action as the eyes and ears of the public, and actually participating in such action. *Compare Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996) (reporters who observed execution of warrant for purpose of gathering news are not joint actors with government agents), *cert. denied*, 117 S. Ct. 1081 (1997) *with Buonocore v. Harris*, 65 F.3d 347, 350 (4th Cir. 1995) (third-party owner of allegedly stolen property who actively engaged in search of premises for property is joint actor with government agents executing warrant).

[4] In actions brought pursuant to 42 U.S.C. § 1983, the operative question is whether the private party acted "under color of state law," a standard that has been treated as synonymous with the test for "governmental action" applicable in the context of a *Bivens* claim such as that asserted here. *See, e.g., Butz v. Economou*, 438 U.S. 478, 500-01 (1978) (same standards under both section 1983

In that case, a reporter for St. Louis television station KSDK contacted law enforcement officials, advised them that he was developing a television news report about the government's attempt to control illegal weapons, and was thereafter granted permission to accompany officers as they undertook a particular enforcement action. *Id.* at 446. The news crew rode to the scene of the investigation in a squad car and followed police officers into the subject's home with cameras as the officers executed a warrant. *Id.* at 446-47. Subsequently, news reports including videotape of the search were broadcast to the public. *Id.* at 447.

Unlike the court below, the Eighth Circuit rejected the contention that such facts are sufficient to render KSDK and its reporter joint actors with the police. As the Eighth Circuit observed in words that apply with equal force to the present case:

> [N]either KSDK nor the police assisted the other in the performance of their separate and respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. The television station was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house.

Id. at 448. The Eighth Circuit recognized that, " 'at most, [the television station's] acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant.' " *Id.* at 448 (quoting *Parker v. Clarke*, 905 F. Supp. 638, 642 (E.D. Mo. 1995)).[5]

---

and *Bivens*); *Lugar v. Edmondson Oil Co.*, 457 U.S. at 924, 928-29, 935 (same).

[5] The Eighth Circuit reached an analogous conclusion in *Buford v. Tremayne*, 747 F.2d 445, 446 (8th Cir. 1984), a section 1983 action instituted by a state court judge against a variety of law enforcement and other officials, a newspaper and one of its reporters. The plaintiff alleged that the officials had conspired with the news media to publicize allegations of misconduct in order to

Like the Eighth Circuit, other courts confronted with section 1983 claims against the news media have recognized that deeming the press to be a joint actor with the government as the result of newsgathering activity is inconsistent with both the constitutional role envisioned for and the very nature of the journalistic enterprise. Consequently, these courts, too, have dismissed such claims because the media's conduct cannot fairly be attributed to the government. For example, in *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980), a former Houston fire chief and two firefighters brought claims under section 1983 against various city officials, an assistant district attorney, the *Houston Post* and one of its reporters. The *Post* had published a series of investigative reports about corruption in the Houston Fire Department and, subsequently, the chief and two firefighters were indicted but acquitted on various charges of misuse or theft of departmental property. *Id.* In their section 1983 action, the three alleged a conspiracy between city officials and the press to discredit the former chief's administration. The allegedly improper acts undertaken in furtherance of the "conspiracy" apparently included the assistant district attorney's pretrial briefings to the reporter and other news media personnel, and the reporter's conduct of interviews with city officials and receipt from them of pertinent documents. *See id.* at 793-94 & nn. 2-3. The district court granted the news media defendants' motion for summary judgment and the Fifth Circuit affirmed. As the court of appeals explained, there was no evidence that the media defendants "were doing anything other than their normal jobs as a newspaper and a reporter" and such activity could not form the basis of a claim that the media defendants were acting in concert with government offi-

---

have him removed from office. *Id.* at 446-47. The reporter acknowledged that he had " 'tried to interview representatives of the judicial commission, its staff and attorneys' " about the charges. *Id.* at 447. The Eighth Circuit concluded that the reporter "acted only in his professional capacity as a reporter, and [that this] negates any inferences of conspiracy or conspiratorial motives" necessary to constitute joint action for purposes of section 1983 liability. *Id.*

cials in a manner sufficient to give rise to liability under section 1983. *Id.* at 794 n.3.

By the same token, in *Brooks v. American Broadcasting Cos.*, 737 F. Supp. 431, 433 (N.D. Ohio 1990), *aff'd in part and vacated in part on other grounds*, 932 F.2d 495 (6th Cir. 1991), the plaintiff sought to amend his complaint to add claims under sections 1981, 1983 and 1985 against ABC and various Ohio officials arising from an interview and broadcast in which that network allegedly suggested that the plaintiff had served as an " 'enforcer' " or " 'hitman' " for a state judge indicted on criminal charges. The plaintiff's proposed amended complaint alleged that ABC had conspired with government officials to deprive him of his right to privacy and, in particular, that Ohio officials had given ABC "access to official investigatory materials in preparing their broadcast." *Id.* at 438-39, 440. In a holding not challenged before the Sixth Circuit, the district court refused to permit the amendment on the ground that it was rendered futile by plaintiff's inability to allege the requisite governmental action, since "[t]he facts as alleged merely demonstrate defendants were acting as any news reporting organization does and this does not constitute state action." *Id.* at 440. As the district court further explained:

> News reporters often have access to official reports and documents to aid them in investigating and preparing a story, yet that alone does not convert these acts into state action. To hold otherwise would be to render many actions by news agencies state actions and this would dilute the historic disassociation between the news media and the government.

Id. (citing *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970)).[6]

---

6 Likewise, in *Mimms v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862 (E.D. Pa. 1972), an inmate brought section 1983 and 1985 claims against the prison warden, a newspaper, its reporter and a photographer based on publication of an article and the plaintiff's photograph without his consent. The court concluded that plaintiff had not and could not allege state action on the part

These cases stand for two previously accepted principles: (1) the gathering and dissemination of news to the public about government conduct is an enterprise distinct from, even if it sometimes occurs parallel to, the function of the government itself in undertaking such conduct, and (2) that the government provides a news organization with access to particular events or with information and documents in anticipation of news coverage amounts neither to a "conspiracy" between the press and the government nor to the kind of concerted action toward a common goal that effectively conflates the two into one governmental actor. The Ninth Circuit rejected these well-grounded principles when it concluded that CNN had engaged in joint action with the Fish & Wildlife Service sufficient to convert its reporters' routine newsgathering efforts into conduct attributable to the government. *See Berger v. Hanlon*, 129 F.3d at 515. As the above-cited and other authorities recognize, the historic disassociation between the government and the press renders them *independent* actors, even when pursuit of their respective goals leads to some degree of interaction. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government."); *Mimms v. Philadelphia Newspapers, Inc.*, 352

---

of the news media defendants, *notwithstanding* that the reporter and photographer were admitted to the prison by the warden and could only have obtained the information published with his assistance, because they were "newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it." *Id.* at 865; *see also, e.g., Fitzpatrick v. Wert*, 432 F. Supp. 601, 603 (W.D.N.Y. 1977) (dismissing action under sections 1983 and 1985 against newspaper reporter and publisher because plaintiff's theory that "by reporting the news and providing editorial comment on current events, [they] were thereby involved in a conspiracy to deprive plaintiffs of equal protection of the laws . . . borders on the preposterous"); *cf. Zerilli v. Evening News Ass'n*, 628 F.2d 217, 224 (D.C. Cir. 1980) ("[t]he values served by a free and vigilant press militate against" imposing *Bivens* liability on news organizations).

BEST AVAILABLE COPY

F. Supp. at 865 (that reporter could only have obtained access to information through assistance of state official did not render reporter actor under color of state law).[7]

The ramifications of the Ninth Circuit's contrary reasoning are far-reaching. Certainly, the Ninth Circuit's rationale cannot logically be confined to the technique of "ride-along" reporting on law enforcement actions. Reporters who obtain permission to observe conditions in hospitals operated by the Department of Veterans Affairs or who are permitted to monitor disaster relief efforts undertaken by the Federal Emergency Management Agency—circumstances in which it often is impossible for reporters to obtain access to the scene of newsworthy events without the advance agreement of the government—would apparently qualify as "governmental actors" under the Ninth Circuit's reasoning.[8] War correspondents who obtain per-

---

[7] The Fish & Wildlife Service is not the only governmental agency to recognize the public's right to information about its enforcement activities. For example, the Los Angeles Police Department observes in its manual that "[c]rime, its results, and the efforts to combat it are all matters of continuing public concern" and the "press serves the public by supplying needed information, by stimulating thought, and by providing a medium for expression." *Manual of the Los Angeles Police Department*, § 420.10 (1992). The *Manual* continues, "[t]he Department is regularly involved in events at which members of the news media are properly present and performing their task of gathering information." *Id.* Indeed, the *Manual* specifies procedures for approving requests from the news media to accompany police officers as they perform their duties. *Id.* § 280. Under the Ninth Circuit's reasoning, it appears that every reporter who seeks and obtains permission to observe L.A.P.D. officers would become a "joint actor" with the government, subjecting the news media to liability for wrongs committed by an officer they are observing. The disincentive to news coverage of law enforcement agencies and their officers created by the decision below is evident.

[8] That such reporting serves the public interest cannot be disputed. *See, e.g.*, Joel Thurtell & Christopher Scanlan, *Room Left Veteran Ashamed to Have Visitors*, Detroit Free Press, June 25, 1989, at 1B (detailing unsanitary and unsafe conditions in VA hospital); Wes Conrad, *Veterans' Hospital is Not at Fault in Choking Death, Its Officials Say*, Phila. Inquirer, Mar. 2, 1995, at B4

mission to accompany troops in the field, and who are required to agree to a host of conditions on their conduct, would apparently also be deemed joint actors with the military.[9] Even the agreements that permit television coverage of the United States Congress could, by the Ninth Circuit's lights, convert the press into a joint actor with the House and Senate, while conditions placed on television coverage of trials, which typically regulate the number and placement of cameras, similarly could transform the press into a joint actor with the courts.[10]

In the last analysis, it simply cannot be said that the Fish & Wildlife Service " 'exercised [such] coercive power or has provided such significant encouragement, either

---

(reporting on death in VA hospital attributed to lack of adequate care); Antoinette Martin, *Ghost Story: If He Could See What has Become of His Life, Jack Walker Would Just Die*, Detroit Free Press, July 8, 1990, Magazine at 6 (reporting VA hospital's role in wife's unsuccessful effort to enforce husband's living will); *Twister Levels South Dakota Town*, Associated Press, June 1, 1998, at A3 (reporting that FEMA teams were enroute to assist residents of town destroyed by tornado); *3 Offices Open Today for Flood, Tornado Aid*, Lexington Herald-Leader, May 9, 1998, at C3 (reporting that FEMA field offices would open to provide financial and other assistance to victims of storms).

[9] *See, e.g., Pentagon Panel Weighs Press Access*, Boston Globe, Feb. 6, 1984, at 1 (panel composed of former war correspondents, military officials and academics appointed to promulgate "formal procedures for reporters and photographers who accompany troops in combat missions" holds hearings); *News Pool Is Okd to Go With Forces on Military Actions*, Phila. Inquirer, Oct. 12, 1984, at A2 (as adopted, rules governing press access to military operations include, *inter alia*, requirement that reporters undergo periodic training exercises with military in order to participate in press pool); Molly Moore, *Long-Secretive U.S. Military has Turned Image-Conscious*, Wash. Post, Sept. 19, 1990, at A18 (describing reporters' unprecedented degree of access to military officials and operations in field during build-up to Gulf War and noting that military invited such coverage).

[10] *See, e.g., Leaders Praise Senate TV and Predict It Will Stay*, San Jose Mercury News, June 3, 1986, at 3A (discussing public benefits derived from Cable-Satellite Public Affairs Network's coverage of Senate proceedings and comparing same to CSPAN's long-standing coverage of House proceedings).

overt or covert, that the choice' " made by CNN to gather material for a news report about enforcement of environmental laws—particularly where, as here, CNN reserved to itself the decision whether to broadcast any such report—" 'must in law be deemed to be that of the [Service].' " *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 546 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)). CNN's decision to pursue and the means by which it prepared its news report "simply is not a governmental decision" and the fact that the Service—which, other than granting access to the law enforcement action, played no role whatsoever in preparation of subsequent news reports—acquiesced in CNN's newsgathering activities "is not enough to make [CNN's] actions those of the Government." 483 U.S. at 547 (citing *Blum v. Yaretsky*, 457 U.S. at 1004-05).[11]

---

[11] The Ninth Circuit's contention that CNN's status as a for-profit business somehow dissipates the deference otherwise due its journalistic conduct is particularly misplaced. Speakers who seek payment for their speech—as is the case with most news organizations, including CNN—neither sacrifice their First Amendment rights nor thereby render themselves more vulnerable to being deemed "governmental actors": "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment" and there is no reason "why operation for profit should have any different effect in the case of motion pictures." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). That the commercial news media, which receive no financial support from government, seek to generate revenue plays no proper role in evaluation of their conduct as it relates to the government.

B. The Ninth Circuit's Holding, That Inviting The News Media To Observe The Execution Of A Search Warrant Is Unreasonable Under The Fourth Amendment, Will Foreclose First-Hand News Reports Of Law Enforcement Activities And Will Deprive The Public Of Valuable Information About The Functioning Of Its Government

Based upon the Fish & Wildlife Service's agreement to permit CNN's reporters to observe its execution of a search warrant at the Bergers' ranch, the Ninth Circuit concluded that the search "[w]as one that at all times was intended to serve a major purpose other than law enforcement." *Berger v. Hanlon*, 129 F.3d at 510. Thus, although the search in all other respects comported with the Constitution, *see id.* at 509, because the news media's planned presence had not been disclosed to the magistrate before he issued the warrant, the Ninth Cicuit concluded that the search violated the Fourth Amendment, *id.* at 508-09, 510-11.[12]

---

[12] The Ninth Circuit's suggestion that reporters properly might be permitted to observe the execution of warrants if the government first obtains approval for the news media's presence from a magistrate is especially troubling. According to the court below, a judicial officer apparently must determine whether a particular search or arrest is appropriately of concern to the public, and then supervise the activities of the news media in the same way that the magistrate would oversee the conduct of law enforcement officers, including, presumably, enforcing the news media's performance of "authorized" news reporting activities. But, as this Court admonished in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), "treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment" and "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment." *See also e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (questioning "wisdom" of requiring courts "to decide on an *ad hoc* basis" which news stories are properly the subject of public interest).

If permitted to stand, the Ninth Circuit's decision will have one overriding effect: To avoid the prospect of a ruling that their officers have violated the constitutional rights of suspects, witnesses and other participants in the criminal justice system, law enforcement agencies at all levels will refuse to permit the news media to observe their activities including, but not limited to, their execution of warrants. Indeed, from the point of view of news organizations, which under the Ninth Circuit's "joint action" ruling would apparently be subject to joint liability for all constitutional violations committed by law enforcement officers, the decision below stands as a powerful disincentive to first-hand reports of official conduct. Under such a regime, the public would be deprived of its principal objective source of information about government activities—a source that has, over the years, yielded news reports of undeniable public benefit. Such a disincentive to speech about matters of public concern is antithetical to this Court's First Amendment jurisprudence.[13]

In this case, footage of the Berger search was included by CNN in news reports, telecast on two of CNN's environmental news programs, concerning the government's ability to enforce wildlife protection laws. *See* Excerpts of Record 8-2, 8-9 (*Berger v. Hanlon*, No. 96-35251 (9th Cir.)); Excerpts of Record 5-2, 5-9 (*Berger v. Cable News Network, Inc.*, No. 96-35266 (9th Cir.)). The government's enforcement of such laws is unquestionably a matter of public concern. "Commentary and reporting on the criminal justice system is at the core of First

---

[13] *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378-79 & n.12 (1984) (if evidence demonstrated that "fairness doctrine" imposed on broadcasters by FCC "effectively chill[ed] speech," Court would be required to reconsider its decision upholding doctrine against First Amendment challenge). Indeed, this Court recently reversed the decision of another court of appeals on analogous grounds. *Arkansas Ed. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998) (noting that, "as a direct result of the Court of Appeals' decision" that public television stations could be liable under First Amendment to political candidates excluded from debates, at least one such debate was canceled).

Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). Indeed, the public's "deserved right to know" about the criminal justice system includes not just proceedings in the nation's courtrooms, but "the prosecution of local crimes in particular" and "the conduct of . . . the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring).

Other valuable reporting that could not have been undertaken without first-hand access to law enforcement activity is legion, including, for example:

- A *Los Angeles Times* reporter, investigating the ability of state police to locate and apprehend sex offenders, accompanied officers as they sought to arrest a convicted child molester, during which process the reporter observed first-hand how easily such offenders can elude police. Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1.
- By accompanying state and federal agents as they investigated a fraudulent scheme involving cellular phones programmed with stolen identification numbers, television reporters were able to present the public with first-hand observations concerning the scheme and how consumers could avoid it. *Prime Time Live: Sorry, Wrong Number* (ABC television broadcast, Sept. 25, 1996).
- Television reporters observed the work of a homicide detective squad for approximately one month in order to present a comprehensive report on the ability of police to solve murders. *ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994).
- In a landmark program, CBS news reporters accompanied law enforcement officers during a 48-hour period in order to document how police dealt

with the development of "crack" cocaine. *CBS News Special: 48 Hours on Crack Street* (CBS television broadcast, Sept. 2, 1986).

- Turning his beat reporting into a book-length account, a newspaper reporter observed two detectives assigned to a homicide division carry out their investigations over a period of months and accompanied them as they executed warrants, resulting in a detailed exploration of the reasons for Los Angeles' high rate of unsolved homicides. Miles Corwin, *The Killing Season: A Summer Inside an LAPD Division* (Simon & Schuster 1997).

Indeed, CNN itself has produced a number of critically acclaimed telecasts employing analogous newsgathering techniques. These include, for example, *The Misery Trade,* which documented the horrifying illegal conditions endured by many unskilled laborers. This award-winning report would not have been possible absent the opportunity to observe raids on sweat shops pursuant to warrants and, thereby, to witness and record the circumstances of the workers. *See CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993) (winner, Sixteenth Annual Cable ACE Award for Short-Form Program Specials).

As this Court repeatedly has emphasized, newspaper and television journalists properly "function[] as surrogates for the public." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 572-73. Because the American public "relies necessarily upon the press" to report on the operations of government, "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975). The species of news reporting at issue here serves to enhance the performance of government officials whose conduct may be observed, and as both the catalyst and raw material of informed public debate. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 570-74. The absence of such public scrutiny "breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law" and, consequently, access to the workings

of the criminal justice system "is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Id.* at 595 (Brennan, J., concurring); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) (public scrutiny serves important structural function of promoting confidence in judicial system); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 492 (same); *In re Oliver*, 333 U.S. 257, 270 (1948) (same).[14]

---

[14] CNN's presence during execution of the search warrant at issue served other important purposes. As the Ninth Circuit noted, the Fish & Wildlife Service permitted CNN to observe its officers as they executed an otherwise valid search warrant because "the government wanted to publicize its efforts to combat environmental crime." *Berger v. Hanlon*, 129 F.3d at 508; *see also id.* at 507. Such "publicity" advances legitimate goals of the criminal justice system, including that of deterrence. As a practical matter, "[i]f a given policy is to have a deterrent effect, offenders and potential offenders need, by definition, to know what that policy is." David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. Univ. L. Rev. 449, 463 (1997); *see also, e.g.*, Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909, 923 (1996) ("the deterrent value of a successful and publicized sting operation is inestimable" because "[i]ndividuals contemplating the commission of an environmental crime in a particular community may change their minds" if publicity makes clear that they may be dealing with undercover officers or that their illegal actions may be videotaped); Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679, 687 (1997) (FTC increasingly relies on highly publicized enforcement "sweeps" targeting single type of illegal activity which "results in greater publicity for law enforcement actions that, in turn, increases consumer awareness of fraud and deters fraudulent marketers"); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 MODERN POLICING 231, 255 (Michael Tonry & Norval Morris eds. 1992) (publicity given to successful police operations "can often translate into a range of tangible benefits, including greater public cooperation with police and better fiscal support from local, state, and national funding sources"); *Safety Checkpoints for DWI Enforcement*, U.S. Dep't of Transp. Nat'l Highway Traffic Safety Admin. Office of Alcohol Countermeasures

Put simply, the Ninth Circuit's ruling that it is unreasonable under the Fourth Amendment for law enforcement officials to permit the news media to be present during the execution of a search warrant will inevitably cause law enforcement agencies to deny such access. The Constitution neither requires nor anticipates such a result. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 572-73; *Grosjean v. American Press Co.,* 297 U.S. at 250.

II. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUITS THAT LEAVES NATIONAL NEWS ORGANIZATIONS AND LAW ENFORCEMENT AGENCIES WITHOUT A UNIFORM CONSTITUTIONAL STANDARD TO WHICH THEY CAN CONFORM THEIR CONDUCT

As discussed in the preceding section, with the decision below, the Ninth Circuit has now effectively declared that permitting the news media to observe the execution of a search warrant is unreasonable and, therefore, a violation of the Fourth Amendment. *Berger v. Hanlon,* 129 F.3d at 512. While this constitutional standard now governs the nine states that comprise the Ninth Circuit, the decisions of other circuits on the same point are neither clear nor uniform, subjecting both the press and law enforcement officials to uncertain and inconsistent standards of liability.

In *Parker v. Boyer,* 93 F.3d 445 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1081 (1997), for example, the Eighth Circuit observed that it is *not* "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 447. Rather, as the Eighth Circuit pointed out, "most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's

---

(1983) (publicity about law enforcement roadblocks is "the chief means of deterring driving while intoxicated") (*cited in People v. Scott,* 473 N.E.2d 1, 4 (N.Y. 1984)).

property while the police search it." *Id.* (citing *Avenson v. Zgart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).

In the Second Circuit, in contrast to the Eighth, Secret Service officers have been held not entitled to qualified immunity for permitting a CBS news crew to accompany them when they executed a search warrant because, according to that court, it was "clearly established" at the time of the search that such conduct violated the Fourth Amendment. *Ayeni v. Mottola*, 35 F.3d 680, 686 & n.8 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). The Sixth Circuit, in turn, has criticized the Second Circuit's reasoning as vague and theoretically unbounded. *Bills v. Aseltine*, 52 F.3d 596, 602-03 (6th Cir.), *cert. denied*, 116 S. Ct. 179 (1995); *see also Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (where warrant made no mention of news media but authorized police to videotape search, subject's rights were not violated when police invited news media along and permitted them to make their own videotape of search).

Adding to the confusion, the *en banc* Fourth Circuit has recently entered the fray as well, a bare majority of that court concluding that a decision by federal marshals and state sheriff's officers to permit news media to accompany them when executing an arrest warrant did *not* violate any clearly established Fourth Amendment principle. *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998). In *Wilson*, federal and state law enforcement officials were engaged in a joint operation to apprehend violent fugitives. The United States Marshals Service had a written policy permitting members of the news media to "ride along" with officers for the purpose of observing and recording operational missions. *Id.* at 113 n.3. Pursuant to this policy, two *Washington Post* reporters, one with a camera, were permitted to accompany officers as they executed an arrest warrant at the suspected residence of

the fugitive. *Id.* at 113. The six judges in the Fourth Circuit's majority observed:

> [R]easonable law enforcement officers might conclude that permitting media representatives to observe and photographically record the execution of an arrest warrant does serve [a legitimate law enforcement] purpose. For example, the purpose may be served by affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions. Additionally, it could be asserted that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers.

Id. at 116. Five judges dissented from this view. Rejecting the suggestion that the presence of the news media served any purpose, the dissenters would have held, as the Ninth Circuit did here, that the presence of the *Washington Post's* reporters was unreasonable under the Fourth Amendment. *Id.* at 120 (Murnaghan, J., dissenting).

In short, the law governing the precise conduct at issue in this case is in conflict and, absent intervention by this Court, the resulting confusion is likely only to intensify. As the dissenters in *Wilson* observed, "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Id.* at 132 (Murnaghan, J., dissenting). In the wake of these conflicting authorities, both the press and law enforcement officials are now subject to uncertain and inconsistent standards of liability. *Amici* and their reporters, editors and producers, like many news organizations, operate on a national basis. Without a uniform constitutional standard to which they may conform their conduct, both the press and government officials are placed in serious jeopardy when news organizations undertake what, in many lower courts, has been held to constitute lawful and valuable newsgathering

BEST AVAILABLE COPY

activity. This Court's guidance is both necessary and desirable in order to eliminate the substantial disarray in which the law now stands. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. at 343 (in context of First Amendment, "unpredictable results and uncertain expectations" are to be avoided and it is responsibility of Supreme Court to "lay down broad rules of general application").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

LEE LEVINE
Counsel of Record
JAY WARD BROWN
LEVINE PIERSON SULLIVAN
& KOCH, L.L.P.
1050 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
Counsel for Amici

APPENDIX

APENDIX A

IDENTITY OF INDIVIDUAL *AMICI CURIAE*

ABC, Inc., an indirect wholly-owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It alone, or through its subsidiaries, owns the ABC Television Network, ten television stations and 28 radio stations.

A.H. Belo Corporation, a publicly-traded (NYSE) company, has numerous wholly-owned subsidiaries, including subsidiaries which operate the *Riverside Press-Enterprise* newspaper in Riverside, California, and KXTV in Sacramento, California; KING-TV in Seattle and KREM-TV in Spokane, Washington; and KGW-TV in Portland, Oregon.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The California Newspaper Publishers Association represents approximately 500 daily and weekly newsaper members and for over 100 years has stood for the right of every individual to participate in the constitutional guarantee of freedom of expression.

CBS Broadcasting Inc., a New York corporation, is a wholly-owned, indirect subsidiary of CBS Corporation. CBS is engaged in the business of producing and broadcasting nationally news and public affairs programming, and operating 14 television stations and 171 radio stations across the country. CBS also owns several cable entities.

The Copley Press, Inc. publishes ten daily newspapers, including *The San Diego Union-Tribune*, whose combined circulation exceeds 500,000 copies, and it operates a national news service.

Fox Television Stations, Inc. ("FTS") owns and operates 22 television stations in major markets. Twenty-one

of the Fox Television Stations broadcast local news and news-related programs several times daily which are an integral part of their schedule. The Fox News Edge distributes a national news service to the FTS stations, as well as Fox Broadcasting Company affiliates and other subscribers.

Gannett Co., Inc. is a diversified news and information company that publishes 91 daily newspapers including *USA Today* and a variety of non-daily publications including *USA Weekend*, a newspaper magazine. Gannett also operates 18 television stations and a national news service.

The Hearst Corporation ("Hearst") is a diversified privately held communications company that publishes newspapers, consumer magazines, books and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

King World Productions, Inc. is a leading worldwide distributor of television programming. King World produces and distributes the daily television news program "Inside Edition," which is broadcast by television stations located throughout the United States.

The Los Angeles Times is the nation's second largest daily metropolitan newspaper with a circulation of more than 1.4 million daily and more than 1.5 million on Sunday.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly

BEST AVAILA

publications covering government, law, literature, religion, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

National Broadcasting Company, Inc. ("NBC") operates a national television network of more than 200 affiliates and 13 owned-and-operated stations that broadcast its programming throughout the United States. NBC reports on matters of general public concern through its Network News Division (which produces, among other programming, *Nightly News with Tom Brokaw, Today,* and *Dateline NBC*) as well as its cable news networks, MSNBC and CNBC.

The National Cable Television Association is the principal trade association of the cable television industry in the United States. Its members include the owners and operators of cable television systems serving over 80 percent of the nation's approximately 65.9 million cable households, as well as the owners and operators of more than 100 cable program networks.

Newspaper Association of America, Inc. ("NAA") is a nonprofit organization representing the interests of more than 1,500 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for almost ninety percent of the daily newspaper circulation in the United States. NAA membership also includes many non-daily U.S. newspapers. NAA represents the First Amendment interests of newspapers to gather and report news and information of public concern.

The Orange County Register, a division of Freedom Communications, Inc., publishes a daily newspaper in

BLE COPY

Santa Ana, California, with a circulation of more than 350,000.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedom case that has been litigated in the United States since 1970.

Tribune Company is a diversified news, information and entertainment company based in Chicago. Among other things, it operates sixteen television stations, four radio stations and a regional cable news service, it publishes four daily newspapers, and produces nationally-syndicated radio and television programs.

Univision Television Group, Inc. is the leading Spanish language television broadcaster in the United States. Univision owns and operates 13 full-power stations in major markets, including Los Angeles, San Francisco, New York, Chicago and Miami. In addition, Univision owns and operates eight low-power stations. All of Univision's full-power stations and five of the low-power stations broadcast news. As a group, Hispanics in the United States constitute the world's fifth-largest Spanish-speaking population. More than two-thirds of Hispanics speak Spanish at home. News broadcasting is a vital component of Univision's overall television programming and it is expected that Univision will continue to be the leading source of news for Hispanic Americans.